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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 04 2009
LIN 06 130 51444

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting firm. According to the petition, the petitioner seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions.

On appeal, prior counsel submitted a brief and additional evidence. On April 20, 2009, this office issued a notice of intent to invalidate the alien employment certification and enter a formal finding of fraud. Specifically, we noted several discrepancies in the beneficiary's employment history. We also raised the petitioner's ability to pay the proffered wage for all of the beneficiaries for whom it has petitioned. In response, the petitioner has resolved some of our concerns. While not withdrawing the appeal (or the separate petition filed by the petitioner in the beneficiary's behalf approved on October 4, 2007), the petitioner also states that the beneficiary is no longer employed with the petitioning company. The petitioner makes no attempt to explain how it has the ability to pay the proffered wage for the 1,706 beneficiaries for whom it has petitioned.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Our decision below will address the following questions that arise from the record of proceedings: (1) whether the job requires a member of the professions holding an advanced degree, (2) whether the record credibly establishes that the beneficiary holds an advanced degree or its regulatory equivalent in the profession encompassing the occupation specified on the alien employment certification and (3) whether the petitioner has established its ability to pay the proffered wage in light of the hundreds of other immigrant and nonimmigrant visa petitions it has filed.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Does the Job Require a Member of the Professions?

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) ***General.*** Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree is the minimum level of education required. On line 4-B, the petitioner indicated that the major field of study required was "any field." Line 6 indicates that five years of experience in the job offered are required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Finally, line 10 reflects that experience in an alternate occupation is not acceptable.

As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin,* 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky,* 12 I&N Dec. 66 (Reg'l. Comm'r. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin,* 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky,* 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Most significantly, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, we must defer to the definition in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation.

Nevertheless, in considering whether the job requires a member of the professions or whether the beneficiary is a member of that profession, we rely on our own definition of "profession" at 8 C.F.R. § 204.5(k)(2). This definition is used by U.S. Citizenship and Immigration Services (USCIS) in determining whether an alien is qualified for the classification sought in this matter, a determination that is solely under USCIS jurisdiction. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). In other words, DOL certification does not bind us in determinations of eligibility for a visa classification. Moreover, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, USCIS is justified in considering, independent of whether the alien meets the job requirements certified by DOL and is a member of some other profession, whether the alien can truly be considered a member of the profession associated with the occupation certified by DOL. We note that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah,* 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977).

According to the Form I-140 petition, the petitioner seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In our April 20, 2009 notice, we noted that the Occupation Title listed on the ETA Form 9089 is Software Engineer, O*NET Code 15-1031. This is the position ultimately certified by the Department of Labor. While the petitioner listed "programmer analyst" on the Form I-140 petition, it also listed the O*NET Code 15-1031. As noted in our April 20, 2009 notice, according to the most recent edition of the Department of Labor's Occupational Outlook Handbook, accessed at www.bls.gov/oco/ocos267.htm on April 16, 2009 and incorporated into the record of proceeding, O*NET Code 15-1031 relates to software engineers. In addition, the same website reveals that software engineers must usually have completed education in computer science or engineering. We

further noted that programmers and analysts have their own O*NET codes: 15-1021 and 15-1051. *See* http://www.bls.gov/oco/ocos110.htm and http://www.bls.gov/oco/ocos287.htm (accessed April 16, 2009 and incorporated into the record of proceedings).

In response, the petitioner submitted evidence that the Illinois Department of Employment Security, in completing the petitioner's prevailing wage request, reviewed the programmer analyst job title and job duties and assigned the code 15-1031. The petitioner also submitted materials from O*NET Online revealing that while the code 15-1031 is titled "Computer Software Engineers, Applications," the "sample of reported job titles" also includes programmer analyst.

The job as certified by DOL in this matter requires a bachelor's degree. On appeal, prior counsel did not provide any evidence that the certified position, computer software engineer, does not normally require a bachelor's degree in a computer related field. Such evidence might have included job advertisements for this position by independent employers listing the job requirements as a bachelor's degree in any field. Thus, the petitioner has not established that entry into the computer software engineer profession is open to anyone holding a baccalaureate regardless of the field.

We emphasize that we do not question DOL's certification of the ETA Form 9089. In this case, DOL was satisfied that the only computer related education or experience for this job was five years of computer related experience. **DOL's certification, however, does not bind USCIS in its** determination of whether the job requires a member of the professions holding an advanced degree in the requisite profession as defined in *our* regulations. More specifically, DOL certification does not bind USCIS in determining eligibility for a specific classification. *Madany,* 696 F. 2d. at 1012-13; *Tongatapu Woodcraft Hawaii, Ltd.,* 736 F. 2d at 1309. To hold otherwise would undermine congressional intent. If USCIS was limited to reviewing a petitioner's self-imposed employment requirements in determining whether a specific job is a profession, then any alien with a bachelor's degree could be brought into the United States under section 203(b)(2) of the Act to perform non-professional employment. *See generally Defensor v. Meissner,* 201 F. 3d 384, 388 (5th Cir. 2000) (only considering the employer's requirements would lead to absurd results).

In light of the above, given the facts of this case and the petitioner's failure to demonstrate that the normal requirement for entry into the computer software engineering profession is a baccalaureate in any concentration, including a completely unrelated concentration, we uphold the director's conclusion that the job certified by DOL does not require a member of the computer science engineering profession or any other profession.

Does the beneficiary hold an advanced degree or the regulatory equivalent in the profession encompassing the occupation specified on the alien employment certification?

Regardless of whether the job requires a member of the professions, the petitioner must also establish that the beneficiary meets those requirements. As stated above, the occupation title certified by DOL is computer software engineer, O*NET Code 15-1031.00, which appears to include some programmer analysts. In Part H, line 6, the petitioner indicated that five years "in the job offered" was required. On line 10, the petitioner indicated that experience in an alternate

occupation was not acceptable. Thus, the petitioner must demonstrate that the beneficiary has at least five years experience as a computer software engineer.

The beneficiary in this matter has a Master's Degree in Sociology from Annamalai University in India. An evaluation from [redacted] of International Credentials Evaluation Services, equates this education to a U.S. baccalaureate in Sociology. [redacted] then concludes that the beneficiary has the equivalent of a *baccalaureate* in computer science based on his alleged 15 years of experience by equating three years of experience to one year of education.

As quoted above, the regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as a degree above the baccalaureate level or a baccalaureate followed by five years of progressive experience. [redacted] did not find that the beneficiary's combination of a baccalaureate in Sociology plus 15 years of alleged computer science experience equated to an advanced degree in Computer Science. Rather, [redacted] concluded that the beneficiary's combination of education in one field and experience in another, completely unrelated field, equated to a *baccalaureate* in Computer Science.

Moreover, the beneficiary's experience is not credibly and consistently documented. On the ETA Form 9089, which the beneficiary signed under penalty of perjury, the beneficiary's experience is listed as follows:

- A programmer analyst for the petitioner at its current address as of September 23, 2004;
- A programmer analyst for SVAM International, Inc. at 233 Eastshore Rd., Suite 1201 from January 1, 2003 through August 20, 2004;
- A programmer analyst for Interactive Communications & Systems, Inc. (ICS) at 233 Eastshore Rd., Suite 1201 from September 1, 2000 through December 18, 2002.
- A technology manager for GE Capital Integrated Business Solutions from June 5, 2000 through August 2, 2000;
- A programmer analyst manager for NIIT, Ltd. from June 15, 1990 through April 14, 2000;
- A software engineer for Bukhatir Investments, Ltd. from March 5, 1987 through June 20, 1990; and
- A software programmer for NIIT, Ltd. from March 1, 1982 through February 3, 1987.

In response to our April 20, 2009 notice, the petitioner demonstrated that programmers and analysts, while having a separate O*NET code, can also fall under O*NET code 15-1031.

The petitioner initially failed to submit the requisite evidence of experience as set forth in the regulation at 8 C.F.R. § 204.5(g)(1). That regulation states, in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

As noted in the AAO's April 20, 2009 notice, while the petitioner is located in Illinois and indicates that the beneficiary has been working for it since 2004, the ETA Form 9089 lists a Florida address for the beneficiary. The AAO further noted that the petitioner expressly indicated in two prior nonimmigrant visa petitions, both on the Form ETA 9035E and in a cover letter that the beneficiary would be working in Naperville, Illinois. As further noted in the AAO notice, the record contains no evidence that the petitioner has offices in Florida.

Based on some of these inconsistencies, the director concluded that the petitioner had not established that the beneficiary had the requisite experience. On appeal, the petitioner submitted two May 11, 2000 letters from [redacted] Group Manager at NIIT, Ltd. and two January 6, 2005 letters from [redacted], one as Executive Vice President of ICS and the other as Executive Vice President of SVAM International, Inc. The letters are numbered pages one through four, sent by facsimile apparently together on April 3, 2005.

One of the letters from [redacted] asserts that the beneficiary worked for NIIT as a programmer/software developer from March 1982 through September 1987. The second letter asserts that the beneficiary worked for NIIT as a Software Engineer from September 1990 through December 1999. The ETA Form 9089, however, indicates that the employment was from June 1990 through April 2000.

The letter from [redacted] on ICS letterhead lists an address of 175 Community Drive in Great Neck, New York while the ETA Form 9089 lists the address of this company as 233 Eastshore Road, Suite 1201 in Great Neck, New York. The letterhead for SVAM International lists the company's address as 233 East Shore Road, Suite 201. Both letters provide identical information, using the exact same verbiage.

As noted in the AAO's April 20, 2009 notice, the nonimmigrant visa petitions filed by the petitioner, LIN-04-217-50443 and WAC-07-231-51203 contain a curriculum vitae (CV) of the beneficiary. The most recent CV indicates that the beneficiary worked as follows:

- As a programmer analyst for Veredus contracted through TechData in Clearwater, Florida from January 2007 through April 2007.

- As a programmer analyst for Kforce contracted at Nielsen Media Research in Oldsmar Florida from January 2007 through April 2007.

- As a programmer analyst for Kforce contracted at Priority One Financial Services, Inc. in St. Pete, Florida from July 2006 through December 2006.

- As a programmer analyst for Veredus contracted at Wellcare, Inc. in Tampa, Florida from February 2006 through June 2006.

- As a programmer analyst for Veredus contracted at Global Signals, Inc. in Sarasota, Florida from July 2004 through February 2006.

- As a programmer analyst for Verizon in Tampa, Florida from December 2003 through June 2004.

- As a programmer analyst for Verizon in Tampa, Florida from September 2002 through November 2003.

- As a senior programmer analyst at Medical Mutual Insurance Company in North Carolina from August 2001 through August 2002.

- As a senior programmer analyst for TMA Resources in Virginia from April 1, 2001 through July 2001.

- As a senior programmer analyst for Interactive Communications in New York from January 2001 through April 2001.

  As a senior programmer analyst for Deutsche Bank in New York from August 2000 through January 2001.

- As a senior analyst for GE Capital India, Ltd. in India from January 2000 through August 2000.

- As a senior programmer analyst for NIIT, Ltd. in New Delhi from June 1990 through January 2000.

This employment is completely inconsistent with the employment on the ETA Form 9089, Part J. While the beneficiary did list employment with ICS and NIIT in both places, the dates for the ICS employment are inconsistent.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In response to the AAO's April 20, 2009 notice, the petitioner submits evidence of Form ETA 9035Es listing the beneficiary's place of employment as Florida. Thus, the petitioner has overcome our concern the the petitioner had misrepresented the location of the beneficiary's employment to DOL. The petitioner also asserts that it had no personal knowledge of the beneficiary's previous employment for other employers and relied on the beneficiary's attestations. While we concur with the petitioner that it is the beneficiary who certified

the information in sections J as correct, it remains that the record does not resolve the above inconsistencies.

In light of the above, the petitioner has not credibly established that the beneficiary has at least five years of experience as a software engineer. Moreover, even if he had the experience claimed, that experience has only been evaluated as equivalent to a U.S. baccalaureate. Thus, the petitioner has not established that the beneficiary has five years of post-baccalaureate level experience. Therefore, the petitioner has not established that the beneficiary is a member of the professions holding an advanced degree or its equivalent as defined at 8 C.F.R. § 204.5(k)(2).

Does the Petitioner have the Ability to Pay the Proffered Wage?

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> ***Ability of prospective employer to pay wage.*** Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on January 30, 2006. The proffered wage as stated on the ETA Form 9089 is $87,402 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of September 23, 2004.

On the petition, the petitioner claimed to have an establishment date on October 1, 1998, a gross annual income of $14,423,839, a net income of $118,797 and 180 employees. In support of the petition, the petitioner submitted its 2003 through 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected

on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *River Street Donuts v. Napolitano,* 2009 WL 531874 *6 (1st Cir. 2009); *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

While the petitioner's net income in 2005, $118,767, and its net current assets, $1,709,381, both exceed the proffered wage, we note that USCIS electronic records reveal that the petitioner, which claims to employ only 180 employees, has filed 1,706 immigrant and nonimmigrant petitions. The record contains no evidence that the petitioner has the ability to pay the proffered wage for all of these aliens, the vast majority of whom are not yet employed by the petitioner. While this concern was noted in the AAO's April 20, 2009 notice, neither counsel nor the petitioner responded to this

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

concern. Thus, the petitioner has not established its ability to pay this beneficiary in addition to the other beneficiaries for whom it has filed petitions.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Misrepresentation on the ETA 9089.

As stated above, the petitioner makes no attempt to resolve the inconsistencies between the beneficiary's alleged experience on the ETA 9089, the experience letters submitted and the beneficiary's curriculum vitae. Rather, the petitioner asserts that the misrepresentation was on the part of the beneficiary.

As the job requires five years of experience in the job offered, the nature of the beneficiary's experience is material. As the petitioner has not overcome our finding that the beneficiary misrepresented his experience to DOL on the ETA Form 9089, we invalidate the alien employment certification pursuant to 20 C.F.R. § 656.30(d). We note that precedent exists for invalidating the alien employment certification at the appellate stage. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm'r. 1986).

Nevertheless, as stated above, the petitioner has resolved our concerns regarding its assertions as to where the beneficiary was working. Moreover, we concur with the petitioner that it had no personal knowledge of the beneficiary's past experience. Thus, we will not enter a finding of fraud against the petitioner. Finally, as the beneficiary has not had an opportunity to respond to the allegations, we will not enter a formal finding of fraud against the beneficiary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The alien employer certification, ETA Form 9089, filed by the petitioner is invalidated.